



**U.S. Department of Justice**

**Criminal Division**

*Office of the Assistant Attorney General*

*Washington, D.C. 20530*

March 12, 2004

**BY Facsimile: (202) 452-3819**

Ms. Jennifer J. Johnson  
Secretary  
Board of Governors of the Federal Reserve System  
20<sup>th</sup> Street and Constitution Avenue, N.W.  
Washington, D.C. 20551

**Re:** Comment on Proposed Amendments to Regulation CC,  
Docket No. R-1176

Dear Ms. Johnson:

The Criminal Division of the Department of Justice submits the attached comment on the proposed rule. While achievement of the **goal** of expediting **check** clearance through utilization of electronic tools such as **check** truncation is **laudable**, **we are** concerned that the regulation be amended to require retention of **original** checks for a reasonable **period** of time, a requirement that is absent from the **proposed** rule and the "Check Clearing for the 21<sup>st</sup> Century Act."

It is imperative to **the success of many criminal** investigations that latent fingerprints, **DNA** material, original handwriting, ink and **paper analyses** and **similar forensic evidence found** only on the original check continue to be available. **As** our **comment** recites, these techniques have been invaluable for the Federal Bureau of Investigation, the Postal Inspection **Service**, and other investigative agencies in successfully investigating numerous crimes ranging from terrorism to financial institution fraud, securities **fraud**, mail fraud and theft and **tax crimes**. If retention of original **checks** is not required, these forensic techniques **will be** rendered impossible.

Thank you for your careful consideration of this comment.

Sincerely,

A handwritten signature in black ink, appearing to read "David E. Nahmias".

David E. Nahmias  
Deputy Assistant Attorney General

Enclosure

### Department of Justice Comments Regarding Check 21 Rulemaking

The **Check Clearing for the 21<sup>st</sup> Century Act (Check 21 Act)** creates a procedure facilitating check truncation to foster innovation in the check collection system by authorizing the use of substitute checks in the check clearance **and** payment **system**, replacing the **current** system that requires the receipt of the original check or **an** electronic copy of the check. The Act and the proposed implementing amendments to Regulation CC provide explicit instructions about the truncation **process** but **do not** address the disposition of the original check after truncation. Absent a provision specifying the retention **of** the original check, potential evidence in the form of latent **fingerprints**, **DNA** material, original handwriting, **ink** and **paper analyses** and similar Forensic evidence found only on the original check could be lost if the truncating bank destroys or **discards** the **original** check.

The Department of Justice recommends that **the proposed** amendments to Regulation CC be revised to include a requirement that the truncating bank send the original check back to the paying bank, **which** would be required to maintain the original check. The Department's provision **also** would require that the original check be retained for the five-year period **and with** the accessibility consistent with the **Bank Secrecy Act** and regulations promulgated thereunder.

Original financial records play **a key** role in the investigation and prosecution **of many** crimes, including terrorism, crimes against financial institutions, **securities** **and** other investment **fraud**, mail **fraud** and theft **and** tax crimes. Congress **has** made a finding that adequate records maintained by financial institutions have **a high degree of usefulness** in ordinary criminal prosecutions **and** that after the terrorist attacks of September 11, 2001, "**such records may also** have a high degree of usefulness in the conduct of intelligence or counterintelligence activities . . . to protect against domestic **and** international terrorism. . . ." 12 U.S.C. § 1829b(a).

Forensic evidence from original checks **has** facilitated successful investigation and prosecution of crimes ranging **from** terrorism to fraud to kidnapping. The Federal Bureau of Investigation estimates **that** over a five year period it conducted forensic examination of documents in approximately 2800 financial institution fraud investigations. The Postal Inspection Service estimates that during **the** last fiscal year alone, approximately **21,000** checks **and** money orders were **examined** for **forensic** evidence in investigations conducted by that **agency**. The FBI and Postal Inspection Service laboratories consider original documents essential for effective forensic examination, **and** other investigative agencies also make important **use** of forensic evidence from original checks.

To ensure that forensic evidence on original checks continues to be available for law enforcement needs, the Department of Justice proposes the addition of a new Subpart E to Regulation CC to read as follows:

**Subpart E-- Original Checks<sup>1</sup>**

**§ 229.71 General Provisions Governing Original Checks.**

"General Provisions Concerning Original Checks"

**Retention of Original Checks**

(a) **Original Checks.** The truncating bank shall deliver the original check to the paying bank. The paying bank shall retain the original check for the period and with the accessibility consistent with Section 101 of the Bank Secrecy Act, as amended, (12 U.S.C. § 1829b) and regulations promulgated thereunder.

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<sup>1</sup>Place as new 12 CFR § 229.71 following new Subpart D.